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## UNWANTED OPT-IN TEXT MESSAGES AS A BASIS FOR CONSTITUTIONAL STANDING

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## I. INTRODUCTION

A multi-circuit split has illuminated a new issue in constitutional law: whether receiving advertisements and promotions in the form of text messages may constitute an injury for the purposes of standing. A majority of the circuits have held that receipt of such text messages is sufficient to show injury, but the Eleventh Circuit has deviated from that pattern, holding that receipt of those text messages is insufficient to show injury.<sup>1</sup> Because of the disparity in the circuit courts' holdings, a fact intensive analysis should be employed.<sup>2</sup>

The main statute in question is the Telephone Consumer Protection Act (TCPA), which was intended to protect individuals against invasive telemarketing calls.<sup>3</sup> One of the aims of the TCPA is to balance the privacy rights of consumers, while also making room for "legitimate telemarketing practices."<sup>4</sup> The recent circuit opinions regarding what types of communications that the TCPA covers have focused mainly on the former aim, while making little to no mention of the latter aim.<sup>5</sup> This note suggests that the courts should give the second factor more weight when determining whether text messages constitute injury for the purposes of standing. While the importance of individual privacy rights cannot be understated, companies must be allowed some leeway in using technology to promote their goods and services, especially in situations where the consumer willingly provides a contact number, such as opt-in text messages from businesses. Furthermore, the courts should also take into consideration both the quantity of

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<sup>1</sup> See Salcedo v. Hanna, 936 F.3d 1162, 1173 (11th Cir. 2019).

<sup>2</sup> *Id.*

<sup>3</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(7), 105 Stat. 2394, 2394.

<sup>4</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394, 2394.

<sup>5</sup> See Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686, 692 (5th Cir. 2021); see also Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1040 (9th Cir. 2017).

texts that the plaintiff has received and any action that the plaintiff has taken to stop the defendant from sending the text messages. If the plaintiff has voluntarily elected to receive such text messages, businesses should not be penalized for utilizing this channel of communication with consumers, especially given the aforementioned aims of the TCPA.

Part II of this note will discuss an overview of the TCPA, including its history and the plaintiff's burden in establishing standing under the TCPA. Part III will continue the discussion with an analysis of the current difficulties in applying the TCPA to various forms of communication, as well as how various circuit courts have used the TCPA in these situations. In Part III, this note will also argue that the circuits should consider both the quantity of the texts that the plaintiff has received and the plaintiff's own actions in receiving the initial text messages. Part IV discusses the current actions that the legislature and the FCC have taken to refine the TCPA.

## II. OVERVIEW OF THE TCPA

### A. TCPA and Text Messages

When the TCPA was first signed into law on December 20, 1991, text messages were not yet in public use.<sup>6</sup> In fact, it would be nearly a year later when the first text message was sent on December 3, 1992, by a Vodafone employee named Neil Papworth.<sup>7</sup> However, cell phones were not yet equipped with the ability to respond to received text messages, so the first text message went unanswered.<sup>8</sup> Today, it is estimated that about 18.7 billion texts are sent and received each day.<sup>9</sup>

While texting remains a very popular form of personal communication, it has also presented companies with a new way to communicate with consumers, namely in the form of advertisements and promotions.<sup>10</sup> In addition to the financial benefits of sending promotions through text message rather than email, consumers are also more likely to read them sooner.<sup>11</sup> In fact, the Federal Communications Commission (FCC) has gathered data suggesting most people who receive texts

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<sup>6</sup> See All Things Considered, *The First Text Message Celebrates 25 Years*, NPR (Dec. 4, 2017), <https://www.npr.org/2017/12/04/568393428/the-first-text-messages-celebrates-25-years>. The history of the TCPA will be discussed in further detail in a later part of this note.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Ivan Blagojević, *Texting Statistics*, 99 FIRMS, <https://99firms.com/blog/texting-statistics/#gref> (last visited Mar. 20, 2023).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

read them almost immediately.<sup>12</sup> Compared to 2021, there has been a 27% increase in the number of businesses who are “telemarketing” in the form of text messages.<sup>13</sup> This is speculated to have resulted from the COVID-19 pandemic, in which much in-person communication was replaced by text messaging.<sup>14</sup> By way of example, one study found that 75% of people saw a marked increase in their cellphone usage during the pandemic.<sup>15</sup> This is likely due to, in part, the COVID-19 lockdowns that forced people to use digital forms of communication, instead of meeting in real life gatherings.<sup>16</sup> As an increasing number of businesses are utilizing text messaging to promote their services, it is raising questions if these companies can best comply with the TCPA requirements.<sup>17</sup>

While text messages may be convenient, especially for businesses, and in some circumstances, consumers, there are certain situations where it is easier to see how a text message invades a consumer’s personal privacy.<sup>18</sup> For example, the company North Face, known for selling outdoor clothing, has tested a feature that employs geo-fencing, which sends out a text advertising sales, products, and nearby store locations if an individual gets within a certain number of feet to one of the company’s store fronts.<sup>19</sup> This area can be as small as half a mile in urban areas, or one mile in suburban areas.<sup>20</sup> While this sounds quite invasive, consumers do have the option to opt out of receiving these texts.<sup>21</sup> It is situations like these that illustrate some of the difficulties in applying the TCPA to more modern forms of communication.

It seems reasonable to believe that the legislature, when writing the TCPA could not have foreseen the explosive increase of text messaging and how it is used

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<sup>12</sup> *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, Declaratory Ruling & Order, FCC 18-178, WT Docket No. 08-7, 33 FCC Rcd. 12075, 12079, 12080 n.41 (2018).

<sup>13</sup> Dani Henion, 2022 Texting & SMS Marketing Statistics, SimpleTexting (May 26, 2022), <https://simpletexting.com/2022-texting-and-sms-marketing-statistics/#>.

<sup>14</sup> *Id.*

<sup>15</sup> Ivan Blagojević, *Texting Statistics*, 99 FIRMS, <https://99firms.com/blog/texting-statistics/#gref> (last visited Mar. 20, 2023).

<sup>16</sup> *Id.*

<sup>17</sup> See *Practical Advice on Texting Consumers*, COMPLIANCEPOINT (Feb. 10, 2020), <https://www.compliancepoint.com/articles/practical-advice-on-texting-consumers/>.

<sup>18</sup> See Claire Cain Miller, *Take a Step Closer for an Invitation to Shop*, N.Y. TIMES (Feb. 22, 2010), <https://www.nytimes.com/2010/02/23/business/media/23adco.html>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

in business communications between companies and consumers.<sup>22</sup> With the convenience of quickly sending out mass batches of advertisements that consumers could instantly see and read, also came new intrusions on consumer privacy.<sup>23</sup> From 2019 to 2020, the FCC saw a 146% increase in the number of filed grievances concerning spam text messages.<sup>24</sup> There is also evidence that spam text messages are slowly edging out spam phone calls, underscoring the importance of this issue.<sup>25</sup> It may be possible that Congress was not yet even aware of text messaging when the TCPA was signed into law, especially since the first text message was not sent until a year after the TCPA became law.<sup>26</sup> Nonetheless, understanding the evolution of the TCPA is important in deducing how text messages fit into this act.

### ***B. History of the TCPA***

The TCPA was first signed into law in response to an influx of spam calls.<sup>27</sup> Congress intended to attempt to restore individual privacy, which was being violated by excessive spam calls.<sup>28</sup> One of the purposes of the TCPA is to balance consumer privacy interests with “legitimate telemarketing practices.”<sup>29</sup> It is also intended to provide a unified legal text for this area to help relieve confusion that may result from multiple states having different bodies of relevant law.<sup>30</sup> In addition, it is meant to prevent companies from circumventing liability “through interstate operations.”<sup>31</sup> Broadly, the TCPA limits the type of ways that companies can communicate with current and potential consumers.<sup>32</sup> It also creates legal recourse for private individuals seeking to bring suit against companies who send

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<sup>22</sup> See All Things Considered, *The First Text Message Celebrates 25 Years*, NPR (Dec. 4, 2017), <https://www.npr.org/2017/12/04/568393428/the-first-text-messages-celebrates-25-years>.

<sup>23</sup> Becky Sullivan, *Complaints about spam texts were up 146% last year. Now, the FCC wants to take action*, NPR (Oct. 19, 2021), <https://www.npr.org/2021/10/19/1047303425/complaints-about-spam-texts-fcc-roboCalls>.

<sup>24</sup> *Id.*

<sup>25</sup> Targeting & Eliminating Unlawful Text Messages, Notice of Proposed Rulemaking, FCC 22-72, CG Docket No. 21-402, 37 FCC Rcd. 11618, 11620 (released Sept. 23, 2022).

<sup>26</sup> All Things Considered, *The First Text Message Celebrates 25 Years*, NPR (Dec. 4, 2017), <https://www.npr.org/2017/12/04/568393428/the-first-text-messages-celebrates-25-years>.

<sup>27</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5), 105 Stat. 2394, 2394.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at § 2(9).

<sup>30</sup> *Id.* at § 2(15), 105 Stat. at 2395.

<sup>31</sup> *Id.* at § 2(7), 105 Stat. at 2394.

<sup>32</sup> 47 U.S.C. § 227(c)(1).

out spam calls.<sup>33</sup> This statute authorizes the FCC and the state Attorney Generals to regulate and enforce the TCPA.<sup>34</sup>

The FCC has acted on this authority by placing a number of regulations in place to implement the TCPA. While the FCC was first created in 1934 to control interstate and foreign communications, such as radio and wire messages, it has expanded to cover phone calls and text messages.<sup>35</sup> In 1992, the FCC mandated that all companies were to keep Do Not Call lists, which included the names of customers with telephones who did not want the company to call them.<sup>36</sup> The Do Not Call Lists were later merged into a national registry in 2003, with the FCC intending to create a system that works more “consistently and efficiently.”<sup>37</sup> However, use of this registry is not free; companies who wish to see more than five area codes must pay to access the list, and they are then tasked with ensuring that they do not call any consumer on the list.<sup>38</sup>

In 2003, the FCC issued a revision of the TCPA of 1991, which specified additional avenues for consumers wishing to avoid unwanted telephone contact from solicitors, by creating a national do not call registry, putting a limit on the maximum number of abandoned calls, requiring telemarketers to transmit caller ID information, and modifying the FCC’s previous advertising requirements.<sup>39</sup>

Despite the TCPA revisions, the legislature has yet to specifically write into the statute that text messages are covered by the TCPA,<sup>40</sup> which has raised controversy with plaintiffs who argue that their privacy has been invaded by spam text messages. One may argue that receiving a text message and the associated notification sound, vibration, or pop-up notification, is less intrusive than a phone call that makes a louder sound for a sustained period of time.<sup>41</sup> However, in the

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<sup>33</sup> *Id.* § 227(b)(3).

<sup>34</sup> *Id.* § 227(f)(1), (3).

<sup>35</sup> *Beginner’s Guide to the TCPA*, JD SUPRA (Oct. 24, 2020), <https://web.archive.org/web/20230331163145/https://www.jdsupra.com/legalnews/beginner-s-guide-to-the-tcpa-69020>.

<sup>36</sup> *FCC Actions on Robocalls, Telemarketing*, Federal Communications Commission, <https://www.fcc.gov/general/telemarketing-and-robocalls#:~:text=In%201992%20the%20Commission%20adopted,do%2Dnot%2Dcall%20lists> (last visited Nov. 26, 2023).

<sup>37</sup> *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Report & Order, FCC 03-153, CG Docket No. 02-278, 18 FCC Rcd. 14014, 14031 (2003).

<sup>38</sup> *National Do Not Call Registry*, FED. TRADE COMM’N, <https://telemarketing.donotcall.gov/faq/faqbusiness.aspx> (last visited March 20, 2023).

<sup>39</sup> See generally 47 C.F.R. § 64 (2003).

<sup>40</sup> See 47 U.S.C § 227.

<sup>41</sup> *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019).

interests of giving businesses an avenue to conduct promotional services, the courts should consider the differences in consumer attitudes towards phone calls versus text messages. If one of the main aims of the TCPA is to maintain individual privacy, should individuals be allowed to dictate how much privacy they would like to maintain? Seeing whether the consumer has taken action to opt out of said text messages may become more important, as an indication of consumer's privacy preferences and to work towards upholding the purposes of the TCPA.

### **C. Current Difficulties in Applying the TCPA to Text Messages**

While this Act may seem to be favorable in progressing the rights of individuals, it has opened the door to a new series of controversies among the circuit Courts, which have differed in their holdings on whether the TCPA covers text messages.<sup>42</sup> Read literally, the TCPA does not cover text messages, and it is difficult to say whether Congress would have foreseen the proliferation of text messaging when the TCPA was written.<sup>43</sup> However, when looking at the aims of the TCPA, it seems that text messaging would fall under the intention of the Act to shield consumers from private law nuisance posed by spam calls, and the FCC has also interpreted the TCPA to apply to text messages.<sup>44</sup>

The TCPA mandates that consumers must consent to automated text messages before companies send them,<sup>45</sup> and in 2012, the FCC held that companies must show "prior express written consent."<sup>46</sup> Companies must be able to show that the consumer has opted in to receiving such text messages, and if the consumer does not opt in through text message in the first place, the company must show that they consented to the messages through another means, which may include verbal

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<sup>42</sup> See generally *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686 (5th Cir. 2021); see also, e.g., *Gadelhak v. AT&T Servs.*, 950 F.3d 458, 461 (7th Cir. 2020); *Salcedo*, 936 F.3d 1162; *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85 (2d Cir. 2019); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037 (9th Cir. 2017).

<sup>43</sup> 47 U.S.C. § 227(a)(4). The pertinent part of this statute reads as follows: "The term 'telephone solicitation' means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person...". *Id.* Here, the TCPA does not make explicit mention to text messages, specifically.

<sup>44</sup> *Salcedo*, 936 F.3d at 1165.

<sup>45</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(12), 105 Stat. 2394, 2394-95.

<sup>46</sup> *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Report & Order, CG Docket No. 02-278, FCC 12-21 (2012).

assent or some paperwork that shows the consumer's consent.<sup>47</sup> To prevent consumer confusion, companies should strive to be clear with what consumers are agreeing to when they provide their contact information.<sup>48</sup>

In 2015, the FCC added further modifications to the TCPA, through the release of a declaratory ruling and order.<sup>49</sup> They reaffirmed the consumer-driven goals of the TCPA but also provided more guidance for companies looking to bring company practices in line with the TCPA requirements.<sup>50</sup> The FCC reaffirmed that text messages fall under the authority of the TCPA.<sup>51</sup> They also reiterated the need to obtain the consent of potential recipients of text messages before sending them said messages.<sup>52</sup> Keeping in line with Congressional intentions to avoid nuisance and invasions of privacy to consumers, it has been argued that text messages are the types of harm that Congress wished to avoid when writing the TCPA.<sup>53</sup> Importantly, the FCC has also emphasized consumer's right to opt out of receiving company texts or calls.<sup>54</sup> Looking at relevant precedent and common law consent, forcing consumers to receive infinite text messages or calls seems unreasonable.<sup>55</sup> The TCPA also contains no statutory language indicating that Congress intended to bar consumers from exercising this right.<sup>56</sup> If consumers contest that they gave consent to receiving the messages or calls, the company must show that they did receive said consent.<sup>57</sup> As long as the company can show that they provided a reasonable way to opt out, they will have complied with the TCPA.<sup>58</sup> For example, allowing a user to stop text messages by replying with "STOP" is considered reasonable by the FCC.<sup>59</sup>

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<sup>47</sup> Lewis Wiener et al., *4 Common TCPA Risks in Text Message Programs*, LAW360 (Apr. 5, 2019), <https://www.law360.com/articles/1146351/4-common-tcpa-risks-in-text-message-programs>.

<sup>48</sup> *Id.*

<sup>49</sup> See *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Declaratory Ruling and Order, FCC 15-72, CG Docket No. 02-278, 30 FCC Rcd. 7961, 7964 (2015) [2015 TCPA Declaratory Ruling & Order].

<sup>50</sup> *Id.* at 7971.

<sup>51</sup> *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Report & Order, FCC 03-153, CG Docket No. 02-278, 18 FCC Rcd. 14014, 14115 para. 165 (2003).

<sup>52</sup> 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

<sup>53</sup> 2015 TCPA Declaratory Ruling & Order, 30 FCC Rcd. at 7964 (2015).

<sup>54</sup> *Id.* at 7996.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Declaratory Ruling & Order, FCC 15-72, CG Docket No. 02-278, 30 FCC Rcd. 7961, 7996 (2015).

Analyzing whether the company has done enough to obtain consumer consent can be difficult, even with the language of the TCPA. The FCC also does not provide much direction for companies seeking to ensure their practices comply with the TCPA. For example, the FCC states that “prior express written consent” to receive business-related text messages can be gained through electronic signatures, which are subject to the requirements under the E-SIGN Act.<sup>60</sup> However, because the E-SIGN Act is not confined to a single type of technology, companies are faced with an array of different ways to obtain consumer signatures for express consent, each of which may be subject to different legal provisions, such as the TCPA.<sup>61</sup>

Even having the consumer confirm that they have read and agreed to the terms and conditions before being sent advertisements may still violate the TCPA.<sup>62</sup> If the page where the consumer checks that they agree merely links to the terms and does not clearly specify that they are consenting to receipt of the text messages, this could be construed as a violation of the TCPA, or even nullify the consent.<sup>63</sup>

#### **D. Plaintiff Burden in Establishing Standing to Sue Under the TCPA**

Plaintiffs wishing to sue under the TCPA must first establish standing; under Article III of the Constitution, the judicial branch is limited to presiding over “Cases” and “Controversies.”<sup>64</sup> Under this section of the Constitution, the moving party must show that they have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) is likely to be redressed by a favorable judicial decision.”<sup>65</sup> An injury in fact is one that is “an invasion of a legally protected interest.”<sup>66</sup> Furthermore, such injuries cannot be hypothetical, and must instead be “concrete and particularized,” and “actual and imminent.”<sup>67</sup> Even if the plaintiff can show some statutory violation, it is

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<sup>60</sup> *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Report & Order, CG Docket No. 02-278, FCC 12-21, 27 FCC Rcd. 1830, 1845 (2012).

<sup>61</sup> *Id.* Under the E-SIGN Act, consent can be acquired through an “email, website form, text message, telephone keypress, or voice recording.” *Id.* Thus, applying the TCPA to different forms of communicative technology that were not available when it was written, such as text messages, can be difficult.

<sup>62</sup> Gregory T. Casamento et al., *Telemarketers Try Novel Approaches For TCPA Compliance*, LAW360 (Mar. 21, 2014), <https://www.law360.com/articles/516816/telemarketers-try-novel-approaches-for-tcpa-compliance>.

<sup>63</sup> *Id.*

<sup>64</sup> U.S. CONST. art. III, § 2.

<sup>65</sup> Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

<sup>66</sup> *Id.* at 560.

<sup>67</sup> *Id.*

insufficient for a showing of injury in fact.<sup>68</sup> Thus, although a company may have violated the TCPA, a plaintiff might not have experienced injury in fact.<sup>69</sup> As a result, while the TCPA provides legal recourse for plaintiffs who allege harm under the statute, they must still establish standing.<sup>70</sup>

In determining whether to recognize a plaintiff's claimed injury in fact, courts have been directed to look at "whether an alleged intangible harm has a close relationship to a harm that has been traditionally been regarded as providing a basis for a lawsuit in English or American courts."<sup>71</sup> In the context of the TCPA, receiving an unwanted and unwarranted text message may be considered to violate the traditional tort of "intrusion upon seclusion."<sup>72</sup> This standard has already been applied to unwarranted phone calls in multiple cases,<sup>73</sup> and has been recognized by Congress in the TCPA.<sup>74</sup> While the definition of injury in fact for the purposes of standing has long been established, applying this rather vague definition in the context of the TCPA and its potential coverage of text messages has led to new and challenging questions for the courts.

### **III. CURRENT CHALLENGES IN APPLYING THE TCPA TO TEXT MESSAGES**

#### **A. Circuit Splits in Interpreting the Scope of the TCPA in Regard to Text Messages**

##### *1. Ninth Circuit*

The Ninth Circuit was one of the first circuit courts to address this issue in *Van Patten v. Vertical Fitness Group*.<sup>75</sup> In this case, the court held that the plaintiff failed to establish standing, even though they found that the plaintiff established injury in fact.<sup>76</sup> The plaintiff had signed up for a gym membership, and the gym had taken his phone number from the application and put it into their contact information database.<sup>77</sup> After a merger with another gym company, the plaintiff's

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<sup>68</sup> *Spokeo v. Robins*, 578 U.S. 330, 340-41 (2016).

<sup>69</sup> 47 U.S.C. § 227(b)(3).

<sup>70</sup> *Id.*

<sup>71</sup> *Spokeo*, 578 U.S. at 341.

<sup>72</sup> RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

<sup>73</sup> See *Susinno v. Work Out World, Inc.*, 862 F.3d 346, 351-52 (3d Cir. 2017); *see also Housh v. Peth*, 133 N.E.2d 340, 343 (Ohio 1956).

<sup>74</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5), 105 Stat. 2394, 2394 (1991).

<sup>75</sup> See generally *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1043 (9th Cir. 2017).

<sup>76</sup> *Id.* at 1049.

<sup>77</sup> *Id.* at 1040.

phone number was used to send the plaintiff two text messages, advertising the gym's services.<sup>78</sup>

The Ninth Circuit found that the plaintiff established injury, merely by receiving the text messages; he was not required to make a showing of injury beyond what was outlined in the TCPA.<sup>79</sup> However, the court also affirmed the district court, that the plaintiff's express consent would be an affirmative defense to the TCPA claim.<sup>80</sup> The court also held that the consent "must be considered to relate to the type of transaction that evoked it."<sup>81</sup> Here, the plaintiff provided his phone number on his gym membership application, which the court interpreted as consent to receiving messages about renewing his membership.<sup>82</sup> Furthermore, the plaintiff failed to show that he revoked his consent; merely canceling his gym membership was insufficient to show that he no longer wanted to be contacted by the company via his phone.<sup>83</sup> Thus, the summary judgment in favor of the defendants was appropriate because the plaintiff consented to receiving texts from the company.<sup>84</sup>

## 2. Second Circuit

The second circuit to address this issue was the Second Circuit, in *Melito v. Experian Marketing Solutions Inc.*<sup>85</sup> In this case, the court found that the plaintiffs did establish standing.<sup>86</sup> Here, receiving non-consensual advertisements was the harm itself.<sup>87</sup> As in the previous Ninth Circuit opinion, the plaintiff was not required to show harm beyond what was outlined in the TCPA.<sup>88</sup> Thus, the TCPA's enumerated harms are essentially a per se list of injuries that plaintiffs may use to show that receiving certain text messages from companies are harmful.<sup>89</sup>

In summary, the Melito court found that the plaintiffs were not required to show more than the fact that the company sent them unwanted text advertisements

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<sup>78</sup> *Id.*

<sup>79</sup> *Spokeo v. Robins*, 578 U.S. 330, 340 (2016).

<sup>80</sup> *Van Patten*, 847 F.3d at 1044.

<sup>81</sup> *Id.* at 1045.

<sup>82</sup> *Id.* at 1040.

<sup>83</sup> *Id.* at 1047.

<sup>84</sup> *Id.* at 1049.

<sup>85</sup> See generally *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85 (2d Cir. 2019).

<sup>86</sup> *Id.* at 96.

<sup>87</sup> *Id.* at 94.

<sup>88</sup> *Id.* at 93.

<sup>89</sup> *Id.*

to establish injury.<sup>90</sup> Furthermore, the second circuit found that these types of text messages were the intended targets of the TCPA, for invading individual privacy rights.<sup>91</sup> In essence, the court found that the text messages were akin to a common law nuisance.<sup>92</sup>

### *3. Seventh Circuit*

The Seventh Circuit also concluded that unwarranted text messages can be considered sufficient grounds for standing in *Gadelhak v. AT&T Services, Inc.*, holding that a showing of unwanted text messages is sufficient to be considered injury in fact.<sup>93</sup> In this case, AT&T utilized a system that stored current customers' phone numbers in a database.<sup>94</sup> The company then sent promotional advertisements to the numbers in this database.<sup>95</sup> Thus, the advertisements were only intended to be received by those who used AT&T's services.<sup>96</sup> However, the plaintiff in this case received promotional text messages from the company, even though he was not a current customer, because of a clerical error in the database.<sup>97</sup> The plaintiff received five text messages from the company, which the court found sufficient to establish injury in fact.<sup>98</sup> While this case specifically dealt promotional texts via a random telephone number generator,<sup>99</sup> it seems that the Seventh Circuit followed the approach set by circuits that previously addressed this issue, holding that the receipt of the unwanted text messages was analogous to common law tort of intrusion, which meant that the plaintiff's alleged harm was "a concrete injury-in-fact for Article III purposes."<sup>100</sup> Furthermore, it was the exact category of injury that the TCPA was intended to prevent.<sup>101</sup>

### *4. Eleventh Circuit*

In a departure from the past circuits' holdings and reasoning, the Eleventh Circuit came to a different conclusion on the same subject in *Salcedo v. Hanna*,

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<sup>90</sup> *Id.* at 93.

<sup>91</sup> *Melito*, 923 F.3d at 85.

<sup>92</sup> *Id.*

<sup>93</sup> See generally *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020).

<sup>94</sup> *Id.* at 461.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 463.

<sup>99</sup> *Gadelhak*, 950 F.3d at 463.

<sup>100</sup> *Id.*

<sup>101</sup> *Van Patten*, 847 F.3d at 1043 (9th Cir. 2017).

holding that a single unwanted text message is insufficient to establish standing.<sup>102</sup> In this case, the plaintiff, acting as part of a class action suit, received a single message from the defendant's law firm, advertising the firm's services.<sup>103</sup> The Eleventh Circuit found that receiving a single text message did not completely bar his use of his phone, as it would have had the advertisement been sent to his fax machine.<sup>104</sup>

Furthermore, the Eleventh Circuit rejected the holding in *Van Patten v. Vertical Fitness Group*, in which two unwanted text messages were said to be sufficient to constitute standing.<sup>105</sup> The Salcedo court held that a single text message is not enough to be considered a traditionally recognized tort nuisance.<sup>106</sup> It does not rise to the level of tortious trespass that would show a sufficient infringement on personal property, or in this case, privacy.<sup>107</sup> Thus, the plaintiff in this case did not experience injury-in-fact that qualified him for standing.<sup>108</sup>

### 5. Fifth Circuit

The Fifth Circuit has issued the most recent opinion on this topic in *Cranor v. 5 Star Nutrition L.L.C.*, holding in accordance with the Ninth, Second, and Seventh Circuits and departing from the Eleventh Circuit.<sup>109</sup> In this case, the plaintiff patronized the defendant's store and provided the store with his cell phone number.<sup>110</sup> The company then used the provided number to send the plaintiff two texts within months of each other, promoting their rewards program and a half off sale.<sup>111</sup> After the second text, the plaintiff responded with "STOP" in an attempt to block future messages.<sup>112</sup> The plaintiff then threatened legal action, and the company settled the case with him for \$1,000.<sup>113</sup> While the matter should have concluded at that point, 5 Star Nutrition sent the plaintiff yet another text message, to which he again replied "STOP," and subsequently filed a class action suit against the company, for violating the TCPA.<sup>114</sup> The Fifth Circuit held that the messages

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<sup>102</sup>*Salcedo*, 936 F.3d at 1162 (11th Cir. 2019).

<sup>103</sup> *Id.* at 1165.

<sup>104</sup> *Id.* at 1167.

<sup>105</sup> *Id.* at 1168; See *Van Patten*, 847 F.3d at 1043.

<sup>106</sup> *Salcedo*, 936 F.3d at 1173.

<sup>107</sup> *Id.* at 1171.

<sup>108</sup> *Id.* at 1173.

<sup>109</sup> See generally *Cranor*, 998 F.3d 686.

<sup>110</sup> *Id.* at 688.

<sup>111</sup> *Id.* at 689.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Cranor*, 998 F.3d 686.

were injury under the TCPA, because they were akin to common law nuisance.<sup>115</sup> The plaintiff's phone battery was depleted and the text messages consumed minutes from his cell phone provider that the plaintiff was entitled to use, further evidence of injury.<sup>116</sup>

The Fifth Circuit rejected the Eleventh Circuit's conclusion, that the TCPA does not cover calls made to phones outside of private residences, specifically cell phones, for several reasons.<sup>117</sup> The Fifth Circuit held that because the TCPA applies to cell phones in its prohibition against sending telemarketing calls at randomly dialed numbers and to "its prohibitions on transmitting false caller ID information,"<sup>118</sup> it is reasonable to infer that the TCPA is intended to deter nuisance calls both inside and outside of the home.<sup>119</sup> In addition, the TCPA specifically names other contexts outside of residential homes where telemarketing calls would also be prohibited, such as hospital rooms, emergency hotlines, or even fax machines, further supporting the inference that the TCPA's reach extends outside of the home.<sup>120</sup> Finally, that court referenced the FCC's authority to write up regulations that ensure compliance with the TCPA.<sup>121</sup> With this broad authority, there is a noticeable absence of any statutory language that limits the FCC to only regulating potential TCPA violations in residential areas.<sup>122</sup> The Eleventh Circuit cited these TCPA provisions as evidence that Congress intended the TCPA to protect consumers in contexts outside of private homes.<sup>123</sup>

## B. Legal Analysis

As evidenced by past precedent, the topic of whether the TCPA applies to text messages has a pattern of being contested within the circuits.<sup>124</sup> According the Eleventh Circuit, it is not clear whether Congress intended the Act to apply to text messaging.<sup>125</sup> The Eleventh Circuit also posited that, despite the authority the FCC has in interpreting the TCPA, Congress has also been silent in how to interpret the

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<sup>115</sup> *Id.* at 692.

<sup>116</sup> *Id.*

<sup>117</sup> *Cranor*, 998 F.3d at 690.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Cranor*, 998 F.3d at 691; 47 U.S.C. § 227(b)(1)(A).

<sup>121</sup> See generally *Cranor v. 5 Star Nutrition, LLC.*, 998 F.3d 686, 691 (5th Cir. 2021).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See generally *Cranor*, 998 F.3d 686; See also generally *Gadelhak v. AT&T Servs*, 950 F.3d 458 (7th Cir. 2020), *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019); See also generally *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85 (2d Cir. 2019); See also generally *Van Patten v. Vertical Fitness Grp., LLC.*, 847 F.3d 1037 (9th Cir. 2017).

<sup>125</sup> *Salcedo*, 936 F.3d at 1169.

TCPA and the scope of its coverage.<sup>126</sup> Furthermore, the Eleventh Circuit has pointed out the amendments that Congress has made to the TCPA since it was enacted in 1991, none of which have added text messages as another category of prohibited telemarketing practices.<sup>127</sup> As a result, the Eleventh Circuit decided to be more conservative in interpreting how expansively the TCPA can be applied, preferring to confine application to what Congress has definitively set out as recognized harms under the TCPA.<sup>128</sup>

In contrast, the other circuits have generally held that receiving the messages are the harm in and of itself.<sup>129</sup> The Ninth Circuit held that the TCPA does apply to text messages, holding that Congress is recognizing “unsolicited contact as a concrete harm.”<sup>130</sup> This broad class of harms, therefore, covers unwanted text messages.<sup>131</sup> Most recently, the Fifth Circuit has confronted this dilemma, concluding that the TCPA applies to text messages.<sup>132</sup> Importantly, the Fifth Circuit emphasized the significance of the attempts the plaintiff made to stop the influx of text messages from the defendant.<sup>133</sup> Texting “STOP” multiple times to the text messages sent by the defendant consumed the plaintiff’s battery life and allotted cellular minutes.<sup>134</sup> Arguably, this specific emphasis on the plaintiff’s own actions should be a significant factor in considering whether a defendant has violated the TCPA.

Holding that a single text message violates the TCPA, as the court held in Salcedo,<sup>135</sup> seems to directly contradict one of the aims of the Act, which is to allow companies to participate in “legitimate telemarketing practices.”<sup>136</sup> More thought should be given to differentiating between texts sent by businesses who are genuinely using them as a legitimate tool of commerce and texts sent by scammers, who represent the harm that the TCPA is specifically meant to guard against. Understandably, this may be a hard line to draw in many scenarios. A scammer wanting to escape liability might argue a legitimate business justification for the

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See generally *Cranor v. 5 Star Nutrition, LLC.*, 998 F.3d 686 (5th Cir. 2021); See also generally *Gadelhak*, 950 F.3d at 458; *Salcedo*, 936 F.3d at 1162; See also generally *Melito*, 923 F.3d at 85; See also generally *Van Patten*, 847 F.3d at 1037.

<sup>130</sup> *Van Patten v. Vertical Fitness Grp., LLC.*, 847 F.3d 1037, 1043 (9th Cir. 2017).

<sup>131</sup> *Id.*

<sup>132</sup> *Cranor*, 998 F.3d at 690.

<sup>133</sup> *Id.* at 692.

<sup>134</sup> *Id.*

<sup>135</sup> *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019).

<sup>136</sup> Telephone Consumer Protection Act of 1991 § 2(9).

intrusive texts. As a result, courts that face a similar issue in the future may want to consider evaluating both the number of texts that the plaintiff received and what, if any, actions the plaintiff has taken to stop the unwanted text messages. These factors may be helpful in assessing the difference between spam texts and business ones.

### *1. Quantity of Texts Received*

Courts that address this issue in the future may want to consider the quantity of text messages that the plaintiff has received. While Article III does not establish a baseline amount of harm that the plaintiff must show, it seems that courts should consider this factor.<sup>137</sup> As the Salcedo court put forth, “the chirp, buzz, or blink of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived [sic] in one’s face.”<sup>138</sup> This analogy is a helpful illustration for evaluating this issue. While companies should not be allowed to send an unreasonable number of text messages to consumers, they should be allowed leeway to send advertisements related to the business to consumers.<sup>139</sup> Today, text messages are arguably a primary source of communication and a quick way for companies to promote their services.<sup>140</sup> As discussed previously in this note, the number of potential consumers using text message as a way to interact with businesses is rapidly increasing.<sup>141</sup> Numerous Forbes articles were released in the past few years alone, devoted solely to giving advice to businesses seeking to use text message format as a way to communicate with current and future consumers.<sup>142</sup> Additionally, one survey of more than one

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<sup>137</sup> See *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987).

<sup>138</sup> *Salcedo*, 936 F.3d at 1172.

<sup>139</sup> Telephone Consumer Protection Act of 1991 § 2(9).

<sup>140</sup> Ivan Blagojević, *Texting Statistics*, 99 FIRMS, <https://99firms.com/blog/texting-statistics/#gref> (last visited Mar. 20, 2023).

<sup>141</sup> Dani Henion, *2022 Texting & SMS Marketing Statistics*, SIMPLETEXTING, (July 12, 2023), <https://simpletexting.com/2022-texting-and-sms-marketing-statistics/#:~:text=In%202021%2C%2042%25%20of%20business,over%2Dgrowth%20in%20SMS%20adoption>.

<sup>142</sup> See generally Norman Happ, *Why Text Messaging Could Be The Marketing Tool You Can't Live Without*, FORBES (Jul. 9 2021), <https://www.forbes.com/sites/forbestechcouncil/2021/07/09/why-text-messaging-could-be-the-marketing-tool-you-can-t-live-without/?sh=3753fc027aa>; see also Tom Wozniak, *Five Tips For Leveraging SMS Marketing in 2022*, FORBES (May 31, 2022), <https://www.forbes.com/sites/forbescommunicationscouncil/2022/05/31/five-tips-for-leveraging-sms-marketing-in-2022/?sh=3a32c95527cc>; see also Venky Balasubramanian, *Read This If Your Business Uses Text Messaging*, FORBES (Jul. 5. 2022, 9:00 AM), <https://www.forbes.com/sites/forbestechcouncil/2022/07/05/read-this-if-your-business-uses-text-messaging/?sh=16e2bb07a576>; see also Brandon Batchelor, *8 Opportunities For Retailers In Text Message Marketing Strategies*, FORBES (Oct. 4, 2022),

thousand three hundred consumers found that 62% of them actually choose to opt-in to the text messaging program of at least one business, underscoring the growth of text messages as a valuable business tool.<sup>143</sup>

## *2. Plaintiff's Own Actions*

Furthermore, the courts should evaluate what the plaintiff has done to stop receipt of the text messages.<sup>144</sup> The FCC has declared that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”<sup>145</sup> An example of such constructive consent would be if an individual completed a credit application and wrote their telephone number on that form.<sup>146</sup> According to the FCC, this is evidence that the individual has consented to receiving calls from the creditor or any agents acting on the creditor’s behalf.<sup>147</sup> The FCC also provides a clear carveout for consumers to avoid these text messages by providing the company with “instructions to the contrary,” indicating that they do not wish to receive such messages.<sup>148</sup> Many companies commonly provide an option to opt out of receiving promotional text messages. For example, the recipient can reply to such a text message with a short phrase, such as “STOP” or “UNSUBSCRIBE” to stop receipt of the unwanted messages.<sup>149</sup>

Where consumers have voluntarily provided a phone number, it seems unreasonable to expect companies to refrain from using it to communicate with their consumer base. As discussed above, in the last year alone, there has been a 27% increase in businesses who use text messages to advertise their services and

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<https://www.forbes.com/sites/forbesbusinessdevelopmentcouncil/2022/10/04/8-opportunities-for-retailers-in-text-message-marketing-strategies/?sh=69a2aa7d1dd0>.

<sup>143</sup> Megan Tocci, *Current Texting and SMS Marketing Statistics*, SIMPLETEXTING (June 10, 2021), <https://simpletexting.com/2021-texting-statistics/>.

<sup>144</sup> See Chris Hoffman, *How to Unsubscribe From Automated Text Messages*, HOW-TO GEEK (Nov. 3, 2020), <https://www.howtogeek.com/671682/how-to-unsubscribe-from-text-messages/>.

<sup>145</sup> *1992 TCPA Order*, 7 FCC Rcd at 8769, para. 31 (citing House Report, 102-317, 1st Sess., 102nd Cong. (1991) at 13).

<sup>146</sup> *Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd at 6, para. 9.

<sup>147</sup> *Id.* at para. 10.

<sup>148</sup> *1992 TCPA Order*, 7 FCC Rcd at 8769, para. 31 (citing House Report, 102-317, 1st Sess., 102nd Cong. (1991) at 13).

<sup>149</sup> Chris Hoffman, *How to Unsubscribe From Automated Text Messages*, HOW-TO GEEK (Nov. 3, 2020), <https://www.howtogeek.com/671682/how-to-unsubscribe-from-text-messages/>.

products.<sup>150</sup> Such rapid growth in a short period of time seems to suggest that many businesses rely on this technology to communicate with consumers. The *Van Patten* and *Cranor* courts briefly acknowledged whether the plaintiff took any action to halt the influx of messages, but neither used it as a major factor in this analysis, instead focusing primarily on concerns for consumer privacy.<sup>151</sup> In keeping with the aims of the TCPA, future courts should more strongly consider the plaintiff's actions. It seems unfair to allow consumers to bring suit based on text messages sent to a number that was voluntarily provided, especially when the FCC has suggested that such texts should be allowed.<sup>152</sup>

In cases like *Cranor*, where the plaintiff texted "STOP" more than once, it may be argued that the plaintiff has a stronger showing of injury, in contrast to a case like *Salcedo*, where the plaintiff made no attempt to be removed from the texting list.<sup>153</sup> Companies should not be penalized for texting consumers when the consumer has taken no action to indicate that they do not want to be texted.<sup>154</sup> As a matter of policy, plaintiffs should be required to show some affirmative action on their behalf to stop such messages. Otherwise, the balancing aims of the TCPA will have been ignored.<sup>155</sup>

The FCC has already started to incorporate such principles into its interpretation and application of the TCPA. In one example from the FCC's 2015 declaratory ruling, the FCC held that YouMail was not in violation of the TCPA when it released on feature on the app that allowed users to set up a text message that would be automatically sent to those who tried to call them but received their voicemail.<sup>156</sup> The FCC considered several factors in reaching its conclusion. First, the user was able to opt-in to the automatically sent text message, by personally creating it.<sup>157</sup> Second, the caller was able to opt out of automated messages they would have otherwise received from the YouMail app.<sup>158</sup> Finally, the automated text messages would display caller ID.<sup>159</sup> The higher degree of consumer

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<sup>150</sup> Dani Henion, 2022 *Texting & SMS Marketing Statistics*, SIMPLETEXTING, (Jul. 12, 2023), <https://simpletexting.com/2022-texting-and-sms-marketing-statistics/#:~:text=In%202021%2C%2042%25%20of%20business,over%2Dgrowth%20in%20SM%20adoption>.

<sup>151</sup> See generally *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037 (9th Cir. 2017); see also generally *Cranor v. 5 Star Nutrition L.L.C.*, 998 F.3d 686 (5th Cir. 2021).

<sup>152</sup> *ACA Declaratory Ruling*, 23 FCC Rcd at 564, para. 10.

<sup>153</sup> *Cranor*, 998 F.3d 686; See also *Salcedo*, 936 F.3d at 1165.

<sup>154</sup> See *ACA Declaratory Ruling*, 23 FCC Rcd at 564, para. 9.

<sup>155</sup> See Telephone Consumer Protection Act of 1991 § 2(9).

<sup>156</sup> 2015 Order, 30 FCC Rcd. 7991 (2015).

<sup>157</sup> *Id.* at 7983.

<sup>158</sup> *Id.* at 7981.

<sup>159</sup> *Id.*

involvement in sending the texts indicated to the FCC that YouMail did not violate the TCPA.<sup>160</sup>

In contrast, the app company Glide was found to have violated the TCPA.<sup>161</sup> With Glide, users have the ability to send video messages with other people through the app, even if the recipient is not a current Glide user.<sup>162</sup> If the recipient of the video does not have the app, Glide sends them a text message with a link to download the app.<sup>163</sup> The FCC declared that this type of text message constituted Glide sending the message, and not the original user who sent the video.<sup>164</sup> What made the text problematic was the lack of consent from the recipient to whom the video and invite text message were sent.<sup>165</sup>

While the FCC is taking action to address spam or fraudulent texts, specifically, because of the power they have to interpret the TCPA, developments in the area of spam texts may open the door to further conversation about whether the TCPA applies to text messages. This will, hopefully, give the courts further guidance in applying the TCPA to text messages. It may also encourage legislative action in amending the TCPA to address this expanding sector in the field of legal issues. Currently, the FCC and Congress are starting to take action to refine and modernize the TCPA.<sup>166</sup>

#### **IV. CURRENT REFINEMENTS OF THE TCPA**

##### **A. FCC**

Today, the FCC continues to work towards refining its interpretation of the TCPA to accommodate new methods of digital communication, including text messages.<sup>167</sup> On September 27, 2022, the FCC released a Notice of Proposed Rulemaking, which included proposed changes to crack down on spam calls and texts.<sup>168</sup> Further complicating the analysis is the increasingly blurred line between legitimate business text messages and scam texts. One of the biggest threats that

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<sup>160</sup> *Id.*

<sup>161</sup> 2015 Order, 30 FCC Rcd. 7982 (2015).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See In re Targeting & Eliminating Unlawful Text Messages, 2022 FCC LEXIS 3125 (F.C.C. September 27, 2022); see also H.R. 8334, 117<sup>th</sup> Cong. (2021-2022).

<sup>167</sup> See In re Targeting & Eliminating Unlawful Text Messages, 2022 FCC LEXIS 3125 (F.C.C. September 27, 2022).

<sup>168</sup> *Id.*

spam texts pose to consumers is the potential for scammers to defraud consumers by sending them malicious links, extorting money, or other deceitful behaviors. One of the newest scams that has emerged in the past few years is scammer groups that send individuals links to fake COVID-19 surveys that are actually an attempt to obtain sensitive personal information.<sup>169</sup> Malicious texts masquerading as COVID-19 related messages have become so numerous that the Federal Trade Commission (FTC) and the Internal Revenue Service (IRS) have sent out public alerts warning consumers about these scams.<sup>170</sup> It is estimated that in 2020 alone, more than eighty-six million dollars were lost to texting fraud operations.<sup>171</sup>

Scammers have become more sophisticated with the methods used to send spam texts emphasizing the need to help consumers distinguish legitimate text messages from those spent by scammers.<sup>172</sup> For example, one technique being used by scammers is a SIM box, which sends out fraudulent messages by associating the box with hundreds of SIM cards.<sup>173</sup> Each of these cards then sends out individual text messages to unsuspecting consumers.<sup>174</sup> This allows the scammers to bypass the volumetric filters of the wireless cellphone companies that might otherwise flag such suspicious activity.<sup>175</sup> Another perhaps less sophisticated scam but just as dangerous method is where scammers will force their way into a cloud-based account that can send messages and text other devices through this account.<sup>176</sup> Unfortunately, for the same reasons that businesses may find text message-based promotions so effective, the fact that consumers are more likely to read received text messages than emails, also increases the likelihood of the consumer's exposure to such fraudulent promotions.<sup>177</sup>

As a result, the FCC put forth a number of solutions. First, while the FCC has established a No Call List for phone calls, it has yet to establish a similar system for text messages. Thus, the FCC proposed a Do-Not-Originate (DNO) list, which puts the burden on wireless cell providers to prevent messages sent from numbers

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<sup>169</sup> *COVID-19 Text Scams*, FCC (Aug. 29, 2021) <https://www.fcc.gov/covid-19-text-scams>.

<sup>170</sup> In re Targeting & Eliminating Unlawful Text Messages, 2022 FCC LEXIS 3125, para. 5 (F.C.C. September 27, 2022).

<sup>171</sup> In re Targeting & Eliminating Unlawful Text Messages, 2022 FCC LEXIS 3125, para. 4 (F.C.C. September 27, 2022).

<sup>172</sup> *Id.*

<sup>173</sup> See FCC, Consumer Advisory Committee, Report on the State of Text Messaging at 9 (2022) (CAC Report).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Wireless Messaging Declaratory Ruling*, 33 FCC Rcd. 12075, 12079-80, para 12 & n.41.

on the DNO list from reaching consumers.<sup>178</sup> Second, the FCC also proposed mandating that wireless cellphone providers apply caller identification technology to text messages.<sup>179</sup>

Presently, called identification information is meant to prevent “spoofing,” with phone calls, whereupon a scammer will disguise their phone number as one the recipient may be more familiar with, increasing the likelihood of eliciting a response from the recipient.<sup>180</sup> Currently, the FCC utilizes a Secure Telephone Identity Revisited (STIR) and Signature-based Handling of Asserted Information Using toKENs (SHAKEN) standards.<sup>181</sup> This system is meant to verify the validity of caller identification for calls sent through internet protocol networks.<sup>182</sup> However, the FCC has not verified that the STIR/SHAKEN framework will work for text messages.<sup>183</sup> The FCC notes that they need more information to determine whether and how such identification information would work with text messages.<sup>184</sup>

While these new requirements may work towards maintaining individual privacy and the aims of the TCPA, the FCC also recognizes the potentially enormous costs associated with implementing these new regulations.<sup>185</sup> The total projected costs are unknown, but the FCC estimates that they will save 6.3 billion dollars in funds lost to fraud and various scams, concluding that the project would pass a cost-benefit analysis.<sup>186</sup> It is also interesting to note that almost an equal percentage of those losses are from receiving text messages as compared to losses resulting from receiving a phone call,<sup>187</sup> suggesting that an absence of reference to text messages in the TCPA may be ignoring almost half of the national financial losses due to spam texts.

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<sup>178</sup> *2017 Call Blocking Report and Order*, 32 FCC Rcd. 9706, 9710-21, paras. 10-40.

<sup>179</sup> In re Targeting & Eliminating Unlawful Text Messages, 2022 FCC LEXIS 3125, para. 2 (F.C.C. September 27, 2022).

<sup>180</sup> See *STIR/SHAKEN Order*, 35 FCC Rcd. 3241, 3142, para. 1.

<sup>181</sup> FCC, *Combating Spoofed Robocalls with Caller ID*, FCC, <https://www.fcc.gov/call-authentication> (last visited Mar. 20, 2023).

<sup>182</sup> *Id.*

<sup>183</sup> In re Targeting & Eliminating Unlawful Text Messages, 2022 FCC LEXIS 3125, para. 2 (F.C.C. September 27, 2022).

<sup>184</sup> *Id.*

<sup>185</sup> Targeting and Eliminating Unlawful Text Messages, 87 Fed. Reg. 61271 (proposed Oct. 11 2022) (to be codified at 47 C.F.R. pt. 64).

<sup>186</sup> *Id.*

<sup>187</sup> House of Representatives, *Representatives Krishnamoorthi And Porter Introduce Robotext Scam Prevention Act To Help Stop Hundreds Of Millions Of Dollars In Annual Fraud Schemes*, HOUSE.GOV (July 12, 2022), <https://krishnamoorthi.house.gov/media/press-releases/representatives-krishnamoorthi-and-porter-introduce-robotext-scam-prevention>.

Thus, it seems likely that such losses may spur the FCC to address application of the TCPA to text messages, because of the major financial interests at stake.<sup>188</sup> These financial losses also underscore the need to reevaluate the scope of the TCPA, in order to give consumers legal recourse against scammers. Such harmful conduct should be an important focus of the TCPA, rather than targeting businesses who seek to use text messages for legitimate business activity.<sup>189</sup> In the past year, Congress has also joined the FCC in taking steps towards protecting consumers from the harms of spam and fraudulent text messages.<sup>190</sup>

### ***B. Congressional Action***

The House of Representatives introduced a bill for the Robotext Scam Prevention Act (RSPA) on July 12, 2022.<sup>191</sup> This bill directly addresses the absence of any reference to text messages in the TCPA, proposing that the phrase “or sent a text message” to the TCPA.<sup>192</sup> This bill, if passed, would also add language to define what a text message is.<sup>193</sup> Included in the proposed definition would be “any text message (other than a call made or text message sent for emergency purposes or with the prior express consent of the recipient of such call or text message)...”<sup>194</sup> Such a seemingly simple addition may go a long way in assisting the courts and the FCC in interpreting the TCPA, as it would then explicitly state that text messages are covered under the Act.<sup>195</sup> As of March of 2023, the bill has only been introduced in the House of Representatives and is pending further legislation.<sup>196</sup>

## **V. CONCLUSION**

Currently, the FCC should continue to revisit their interpretation of what the TCPA covers, and the courts should evaluate the number of messages received

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<sup>188</sup> See Targeting and Eliminating Unlawful Text Messages, 87 Fed. Reg. 61271 (proposed Oct. 11 2022) (to be codified at 47 C.F.R. pt. 64).

<sup>189</sup> See Telephone Consumer Protection Act of 1991 § 2(9).

<sup>190</sup> House of Representatives, *Representatives Krishnamoorthi And Porter Introduce Robotext Scam Prevention Act To Help Stop Hundreds Of Millions Of Dollars In Annual Fraud Schemes*, HOUSE.GOV (July 12, 2022), <https://krishnamoorthi.house.gov/media/press-releases/representatives-krishnamoorthi-and-porter-introduce-robotext-scam-prevention>.

<sup>191</sup> *Id.*

<sup>192</sup> H.R. 8334, 117<sup>th</sup> Cong. (2021-2022).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

and the plaintiff's own actions in evaluating future cases on this topic.<sup>197</sup> It seems that the FCC is working towards taking steps to help address modern issues that have begun, due to the rapid proliferation of texting as a form of digital communication.<sup>198</sup> Furthermore, if the RSPA is passed by Congress, that would lend greater clarity to this issue, specifying that the scope of the TCPA includes text messages.<sup>199</sup> The RSPA would also provide the courts with more explicit guidance on how to apply the TCPA to cases where a plaintiff alleges injury from receipt of one or more text messages.<sup>200</sup>

The courts should also stay abreast of emerging trends in this area of technology to help ensure that the goals of the TCPA are being met, which includes a careful balance of citizens' privacy and the legitimate business practices of those trying to market to these same people. FCC states that they will seek to gather more information on the potential risks and benefits of reforming what the TCPA means.<sup>201</sup> Hopefully, this information will both assist the courts in making better informed rulings on these issues that also carry much financial weight, as well as balancing the intended purposes of the TCPA to protect consumers and allow businesses to engage in valid business practices.

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<sup>197</sup> See generally Targeting and Eliminating Unlawful Text Messages, 87 Fed. Reg. 61271 (proposed Oct. 11 2022) (to be codified at 47 C.F.R. pt. 64).

<sup>198</sup> *Id.*

<sup>199</sup> H.R. 8334, 117<sup>th</sup> Cong. (2021-2022).

<sup>200</sup> *See id.*

<sup>201</sup> See generally Targeting and Eliminating Unlawful Text Messages, 87 Fed. Reg. 61271 (proposed Oct. 11 2022) (to be codified at 47 C.F.R. pt. 64).